Timing Is Everything

When to Ask for a Settlement Conference

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Every week, I have several conference calls with attorneys who are seeking a settlement conference with me. I conduct these calls prior to scheduling a settlement conference to determine why the attorneys believe it's the right time to engage the court's assistance in settlement discussions.

I have found that cases generally come to me at one of four distinct times during the litigation—after the answer is filed, after written discovery is received, after fact discovery closes, and prior to preparation of the final pretrial order. Each of these instances has unique characteristics that encourage parties to consider settlement. I try to be attuned to those particular characteristics, as they tend to drive the settlement discussions during the conference. However, I often find that counsel are not focused on these different timing considerations and sometimes believe that settlement conferences, at any point in the litigation, operate in the same manner. Nothing could be further from the truth. By better understanding the different considerations that affect the discussions, attorneys can pick the right time to seek a settlement conference for their particular circumstances.

Conferences After an Answer Is Filed

Once an answer is filed, lawyers know that there is a long road ahead. On the defendant's side, the client now knows the motion to dismiss (if there was one) did not dispose of the case. What comes next is usually a lengthy and expensive discovery process involving significant document production, potentially contentious motion practice, and depositions that consume valuable time and money. On the plaintiff's side, the burden is now on counsel to gather evidence to actually prove the case. With contingency fee cases, that means counsel will foot the bill in doing so for about one year. The plaintiff now knows that there are still several years to go before any resolution is reached. At this stage, there are natural incentives on both sides to seek an early resolution of the case.

The challenge with an early settlement conference is that a thorough evaluation of the merits of the case is rarely possible. Before document productions and depositions, both sides are typically working with merely what they anticipate discovery will uncover. Sometimes assertions about the facts are made to me without counsel having even reviewed the client's own documents, let alone viewing what the other side has to offer. It is, of course, really easy to write a statement detailing the facts of the case when all you have is your client's version! Thus, in these circumstances, it is important for attorneys to recognize that a settlement conference will likely not focus on the merits of the case, and a neutral evaluation of the likelihood of success is very difficult, if not impossible. This is why I often question

counsel extensively about why they seek a settlement conference so early in the case, prior to any discovery, to ensure that counsel do not have unreasonable expectations about what will happen in such a conference.

Expense and time in litigation are the most significant factors for parties seeking an early resolution through a settlement conference. The parties can save about a year's worth of fees and costs from discovery, as well as avoid the risk that discovery will reveal a better hand for the other side. Those are the primary considerations in an early settlement conference, barring certain exceptional circumstances such as a pre-suit exchange of documents. As a result, an early settlement conference can be most productive where the parties truly seek to minimize the time and expense of the litigation and wish to reach more of a "business" resolution—rather than one that factors in the strengths or weaknesses of the case on its merits.

Conferences After Discovery

Once interrogatories have been answered and documents exchanged and reviewed, each side has a better sense of the quantity and quality of the evidence. For example, in an employment discrimination case, there might be significant documentary evidence that supports an entirely different set of events than what the plaintiff has asserted to counsel. This often comes in the form of disciplinary records that identify the basis for an employee's departure from the company. Or a plaintiff may learn the exact opposite through discovery–that the employer did not sufficiently document its criticisms such that claims about lackluster performance are not supported by the company's own records. Furthermore, having obtained internal emails and other communications that usually form the basis for deposition questions, attorneys can now evaluate whether depositions will really be fruitful or will support the company's position.

While producing documents and responding to interrogatories certainly involve some time and expense, a settlement conference at this juncture is, in my view, often ideal. In this age of primarily digital communication, each side generally has a true sense of the strengths and weaknesses of the opponent's case after written discovery is completed. Because depositions have not yet occurred, there are also significant cost savings in reaching a settlement before time is expended preparing witnesses and taking and defending depositions. In addition, for a party that has numerous fact witness employees, there are clear advantages to not having to pull their focus and time away from their day-to-day jobs to sit in the hot seat for seven hours. In these circumstances, the clients obtain the best of both worlds at a settlement conference—some cost savings as well as a decent evaluation of the merits of the case—and can negotiate while factoring in those considerations. Of course, a party's needs and interests often go beyond the time and expense of litigation and the likelihood of success, but in a typical federal court case, these tend to be significant concerns and subjects of discussion at the settlement conference.

In addition, after written discovery but prior to depositions, the sides are usually not so firmly dug into the case that they are inclined to hold out for a complete victory. In many respects, it's the equivalent of an amateur gambler at a casino table—it's easier to walk away when your losses are still small. Once you are deep into the game and have expended significant funds, there is a lot of incentive to continue to try to win it all back.

> To ensure the most productive conference possible, counsel should recognize the stage of the case.

For these reasons, I have found that after written discovery has been completed is often the best time for the parties to request a settlement conference. I encourage lawyers to seek the court's assistance with settlement at this juncture.

Conferences After Fact Discovery

A settlement conference after all fact discovery is completed allows for a full assessment of the merits of a case. Each side has seen and questioned the opponent's witnesses, and the parties can better visualize how a trial will play out. The neutral will also be able to more fully assess and evaluate the merits of the case, as each side will point out portions of depositions and documents that support that side's claims. In private sessions, counsel can be honest about problematic pieces of evidence and why a jury could return an unfavorable verdict against their client. While both sides will have made significant expenditures already in the case, there are still substantial cost savings to be had, particularly if the parties intend to proceed next with expert discovery. Briefing on motions for summary judgment is also expensive and time-consuming. Combined with the waiting time for a decision on the motion, the time frame from the start of briefing to a resolution of the motion can easily exceed one year.

Illustration by Max Licht

A barrier to settlement at this stage is the attorney fees already expended. Settlement numbers that were discussed pre-discovery are difficult to reignite because they will generally not be sufficient to compensate plaintiff's counsel for fees and costs incurred in the interim. On the defense side, the defendant may feel sufficiently committed to the litigation in time and expense to push through and not settle.

The other barrier is that a summary judgment motion has the potential for an outright win, particularly for the defendant. While a plaintiff needs only to survive the process, a defendant often has the opportunity for complete success. I find that as the case gets closer to the dispositive motion deadline, clients get less interested in compromise because there is a chance for total victory, with the opportunity to resume settlement talks if the case survives.

Thus, when there is a natural break between fact and expert discovery, a settlement conference is more successful at this juncture than one where the very next step is the filing of a dispositive motion. There are still clear incentives to settle the case and benefits with a fully developed factual record, but there are also challenges that can make settlement harder. I recognize that attorneys often find that the close of fact discovery is an opportune time for a settlement conference, but for the above reasons, I much prefer a conference after written discovery and before oral discovery.

Conferences Before the Final Pretrial Order

When a court has denied summary judgment on at least some claims, the parties know that the case will proceed to trial. At this point, they must start the arduous process of putting together the final pretrial order, including the motions in limine, and begin preparing their witnesses and exhibits for trial.

Here, the strongest incentive for each party to have a settlement conference is the risk and uncertainty involved with proceeding to a verdict as a resolution of the dispute. Litigation is generally a zero-sum game, and it is rare that a trial verdict results in contentment on both sides. Other important factors come into play at this time, including the need to pull executives and employees into trial preparation mode, the negative publicity that a case may generate, and the greater expense that will be incurred with a trial, along with the potential for fee shifting and punitive damages if the claim permits that relief.

Without doubt, just before entering full trial preparation mode is an opportune time to hold a settlement conference. There is too much at risk for each side at this point not to consider an alternative means of dispute resolution. I encourage attorneys to request a conference before the hard work of putting together the final pretrial order and when there is still time on the schedule to devote to preparation for a settlement conference. I find that the closer a settlement conference gets to a trial date, the more counsel and the clients are too distracted by trial preparation to focus on the settlement discussions.

Bad Times for a Conference

You might wonder if there is any particularly bad time for a settlement conference. From my experience, I have generally found that there are certain inopportune times for settlement discussions that make the odds of settling a case much, much lower. One example is when a motion to dismiss or a motion for summary judgment is pending. At this stage, there is certainly some desire to mitigate the risk of an adverse ruling on either side by settling before a decision has been rendered. But because the parties have already expended the time and expense in briefing their positions, combined with confidence in their arguments after having seen them on paper and perhaps at oral argument, these factors generally result in a conference that ends without settlement. Thus, I am often hesitant to spend the time and resources required in a settlement conference with a dispositive motion pending.

Another inopportune time is when attorneys or clients are not fully committed to the settlement process. That usually takes the form of comments such as "We are not optimistic, but let's see what happens" or "There is always value in talking so we are not opposed to a conference." These vague, noncommittal statements demonstrate to me that the attorneys or the clients are not in the right headspace and that they are not yet willing to compromise to the point that a settlement is likely. There is certainly the possibility of a breakthrough at a settlement conference, but simply because it is possible doesn't mean it is worth the time, resources, and expense to proceed with a conference that is set up for a low chance of success.

Timing is everything. What does that mean? My research on that phrase revealed the following definition: "The success of something is often related to when it happens." True words in the settlement context. I know that interest in settlement conferences sometimes occurs randomly, such as when one side raises it at a conference call about other matters or when suggested by the presiding judge at a routine status hearing. However, my suggestion is that counsel should recognize the stage of the case and the different considerations involved with the timing of the conference, to ensure the most productive conference possible with the best chance of success. ■